Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

TERRY KINCAID,

Petitioner

v.

STATE OF INDIANA

On Petition for Writ of Certiorari
To The Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a sentence which requires a defendant to serve the same term of probation twice for the same offense violates the Fifth Amendment guarantee against double jeopardy

2. Whether Due Process is violated by the retroactive application of changes in Indiana law which allowed for the first time a trial court to sentence a defendant for a probation violation that occurred during a term of probation that was unconstitutional and void *ab intio*

PARTIES TO THE PROCEEDING

1. Terry Kincaid

2. State of Indiana

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Cited Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 6

Conclusion 14

TABLE OF CITED AUTHORITIES

Cases

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056 (1969) . .6

Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098 (1974) .10

Bouie v. City of Columbia,
378 U.S. 347, 84 S.Ct. 1697 (1964) 13

Douglas v. Buder, 412 U.S. 430, 93 S.Ct. 2199 (1973) . .13

Elkins v. State, 659 N.E.2d 563 (Ind.App. 1995) 12

Gilreath v. State, 748 N.E.2d 919 (Ind.App. 2001) . .11, 12

Hicks v. Feiock, 485 U.S. 624, 108 S.Ct. 1423 (1988) . . .8

Kennick v. Superior Court, 736 F.2d 1277 (9th Cir. 1983) 8

Kincaid v. State, 757 N.E.2d 713 (Ind.App. 2001) .1, 5, 12

Kleinrichert v. State, 297 N.E.2d 822 (Ind. 1973) 12

Kopkey v. State, 743 N.E.2d 331 (Ind.App. 2001) 8

Lewandowski v. State, 389 N.E.2d 706 (Ind. 1979) 12

Menna v. New York, 423 U.S. 61, 96 S.Ct. 241 (1975) . .10

North Carolina v. Pearce,
395 U.S. 711, 89 S.Ct. 2072 (1969) 4, 6, 8, 10

Rogers v. Tennessee,
532 U.S. 451, 121 S.Ct. 1693 (2001) 11

Slayton v. State, 534 N.E.2d 1130 (Ind.App. 1989) ..11, 12

State v. Kincaid, 778 N.E.2d 789 (Ind. 2002) 1, 5, 9

United States v. Broce,
488 U.S. 563, 109 S.Ct. 757 (1989) 10

Statutes and Constitutional Provisions

28 U.S.C. § 1257 1

United States Constitution, Amendment V 1, 2, 4, 14

United States Constitution, Amendment XIV, § 1 ....1, 14

OPINIONS BELOW

The opinion of the Indiana Court of Appeals is reported at *Kincaid v. State*, 757 N.E.2d 713 (Ind.App. 2001) and is located at Appendix A. The opinion of the Indiana Supreme Court is reported at *State v. Kincaid*, 778 N.E.2d 789 (Ind. 2002) and is located at Appendix B.

JURISDICTION

The opinion of the Indiana Supreme Court was issued on November 12, 2002. The Indiana Supreme Court denied a Petition for Rehearing without opinion on February 19, 2003. The Order denying the Petition for Rehearing is located at Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause is contained in Section 1 of the Fourteenth Amendment and provides that...

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

The guaranty against double jeopardy is contained in the Fifth Amendment and provides that...

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On July 29, 1996, the State Of Indiana (the "State") filed charges of Escape, Attempted Theft, Operating While Intoxicated, Criminal Mischief (2 counts), and Resisting Law Enforcement against Terry R. Kincaid ("Kincaid"). On September 16, 1997, the State and Kincaid executed a Plea Agreement. The Plea Agreement called for Kincaid to plead guilty to two (2) Class A misdemeanors, Resisting Law Enforcement and Operating While Intoxicated. The sentences were to run consecutive for a total sentence of two (2) years, suspended except for time served, two (2) years probation, a fine, costs with the terms of probation left to the Court. The trial court accepted the Plea Agreement and sentenced Kincaid on September 22, 1997 to time served and two (2) years supervised probation. The terms of Kincaid's supervised probation included, but were not limited to the following: keeping all appointments with his probation officer; receiving permission prior to moving or leaving the state; avoiding associating with any person engaged in illegal activity; payment of court costs of $325, a $100 fine, $150 to the Court Drug & Alcohol Program and probation user's fees of $280; abstaining from consuming alcoholic beverages; signing a 4th Amendment Waiver; performing 40 hours community service; attending a victim impact panel; writing two reports; and a 180 day license suspension.

On October 6, 1999, after completing his original two (2) year term of probation, Kincaid filed a Verified Petition for Post Conviction Relief. The trial court held a hearing and granted Kincaid's Petition on February 3, 2000. The trial court accordingly ordered the conviction entered on September 22, 1997 set aside.

On February 17, 2000, the State and Kincaid entered into a Plea Agreement which was identical to the Plea Agreement they had entered on September 16, 1997. The trial court accepted the Plea Agreement and sentenced Kincaid on February 23, 2000 to time served and two (2) years supervised probation. Kincaid requested credit for the two (2) years he had served on probation before his conviction was set aside and argued that he did not have any probation remaining to be served. The trial court denied Kincaid's request and re-sentenced him to serve the same two (2) year term of probation for the second time. The terms of Kincaid's supervised probation were the same as the terms established by the trial court on September 22, 1997. Kincaid, therefore, had to serve another two (2) years of probation prospectively from February 23, 2000. If Kincaid had been credited for the probation previously served, he would not have had any further term of probation to serve.

Kincaid did not take a direct appeal of the trial court's denial of his request for credit for the time he had spent on probation before his conviction was set aside. At the time Kincaid was re-sentenced, the law in Indiana stated that an illegal sentence could be challenged at any time. Indiana law at the time Kincaid was re-sentenced also stated that a defendant could not be sentenced for a violation of probation if he was not legally on probation. Under this precedent, an illegal term of probation terminated as a matter of law.

The State filed a Petition to Revoke Kincaid's probation on August 2, 2000, after Kincaid was arrested on another charge of operating while intoxicated. After the Petition to Revoke Probation was filed, Kincaid filed a Motion to Correct Erroneous Sentence and to Dismiss Petition to Revoke Probation. The trial court entered an Order denying the Motion on September 5, 2000. Kincaid filed a Motion to Reconsider Defendant's Motion to Correct Erroneous Sentence and to Dismiss Petition to Revoke on October 5, 2000. The Motion to Reconsider clarified that Kincaid was seeking credit for the two (2) years he had served on probation under the Double Jeopardy Clause of the United States Constitution, Amendment V, and *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969). The trial court entered an Order denying Kincaid's Motion to Reconsider but stated that it would grant permission for an interlocutory appeal if requested on October 11, 2000. The trial court granted Kincaid permission to seek interlocutory appeal on November 7, 2000. The Indiana Court of Appeals denied Kincaid's petition for interlocutory appeal on December 4, 2000 and the trial court set the matter for Final Hearing on Petition to Revoke.

The Final Hearing on Petition to Revoke was held on March 1, 2001. Kincaid renewed his Motion to Correct Erroneous Sentence and to Dismiss Petition to Revoke on the basis he was not legally on probation at the time of the alleged violation. His Motion was overruled. Kincaid then admitted to violating the terms of his probation by consuming alcohol at the Final Hearing. The trial court ordered Kincaid to execute the remaining portion of his sentence, two (2) years, and granted Kincaid's Motion to Stay Sentence Pending Appeal.

Kincaid appealed the trial court's order that he execute two (2) years at the Indiana Department of Correction for violating his probation. The Indiana Court of Appeals unani-

mously reversed the trial court. The Indiana Court of Appeals held that the trial court erred in sentencing Kincaid to serve the same two (2) year period of probation twice for the same offense. It further followed Indiana precedent and held that Kincaid's probation could not be revoked since he was not legally on probation at the time of the alleged violation. It then remanded the case to the trial court with instructions to dismiss the Petition to Revoke Probation. *Kincaid v. State*, 757 N.E.2d 713 (Ind.App. 2001).

The State filed a Petition to Transfer with the Indiana Supreme Court on April 12, 2002. The State, as it did before the trial court and the Indiana Court of Appeals, argued only that Kincaid was not entitled to credit for the two (2) years that he had served on probation prior to his conviction being set aside. The Indiana Supreme Court granted transfer on April 26, 2002, and issued it's Opinion on Transfer on November 12, 2002. The Indiana Supreme Court agreed with the Court of Appeals that Kincaid that was entitled to credit for the time he spent on probation prior to his conviction being set aside. However, the Indiana Supreme Court further held that the trial court did not err in revoking Kincaid's probation and ordering him to serve two (2) years at the Department of Correction because Kincaid was in fact on probation at the time of his violation, even though it was an unconstitutional term of probation *ab initio*. *State v. Kincaid*, 778 N.E.2d 789 (Ind. 2002). This dispositive issue was never argued by the State but was raised *sua sponte* by the Indiana Supreme Court for the first time on transfer.

Kincaid filed a Petition for Rehearing with the Indiana Supreme Court on December 10, 2002. Kincaid argued on rehearing that the Indiana Supreme Court erred in overturning the Court of Appeals for multiple reasons: The denial of the credit for the time he spent on probation was fundamen-

tal error that could not be waived; Kincaid had not waived the error because he requested credit for the time he spent on probation at the time he was re-sentenced by the trial court; the issue of waiver was not properly before the Supreme Court on transfer because it had not been raised by the State; and, finally, the Indiana Supreme Court's Opinion should be given prospective application only because it established a new rule of law without fair warning and that Kincaid had relied on the law in effect at the time of his re-sentencing in deciding not to take a direct appeal. The Indiana Supreme Court denied the Petition for Rehearing without opinion on February 19, 2003.

REASONS FOR GRANTING THE WRIT

1. Kincaid was entitled to credit for the two (2) year term of probation he served prior to having his conviction set aside

The federal Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This clause is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969). It protects persons from suffering (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction and (3) multiple punishments for the same offense. The third protection provided by the Clause is at issue in this case.

The seminal case addressing a trial court's obligation to credit a defendant with punishment exacted prior to granting a petition for post conviction relief is *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969). The defendant in *Pearce* was convicted of a crime and sentenced to a prison term. The original conviction was set aside in a post-

conviction proceeding for constitutional error several years later. On retrial, the defendant was again convicted and sentenced. On re-sentencing, the defendant received a longer sentence and received no credit for the prison time he had already served. He sought habeas corpus relief in the federal district court, which held that the longer sentence and the failure to credit him for time already served were unconstitutional as violating the federal Double Jeopardy Clause. The Court of Appeals affirmed and the government sought certiorari. This Court affirmed, holding that the failure to credit the defendant for the time already served was unconstitutional under the Double Jeopardy Clause, stating:

> We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully "credited" in imposing sentence upon a new conviction for the same offense. The constitutional violation is flagrantly apparent in a case allowing imposition of a maximum sentence after reconviction. Suppose, for example, in a jurisdiction where the maximum allowable sentence for larceny is ten years imprisonment, a man succeeds in getting his larceny conviction set aside after serving three years in prison. If, upon reconviction, he is given a ten year sentence, then, quite clearly, he will have received multiple punishments for the same offense. For he will have been compelled to serve separate prison terms of three years and ten years, although the maximum single punishment for the offense is ten years imprisonment. **Though not so dramatically evident, the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.**

> **We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense.**

Pearce, 395 U.S. at 718-719 (emphasis added).

This case is nearly on all fours with *Pearce*; the only distinction being that Kincaid is seeking credit for time he spent on probation and Pearce sought and received credit for time he was imprisoned. As found by both the Indiana Court of Appeals and the Indiana Supreme Court, this distinction is meaningless. Probation is punishment, although a less harsh form of punishment than imprisonment. *See Hicks v. Feiock*, 485 U.S. 624, 639, fn. 11 (1988) (That a determinate sentence is suspended and the contemnor put on probation does not make the remedy civil in nature, for a suspended sentence, without more, remains a determinate sentence, and **a fixed term of probation is itself a punishment that is criminal in nature**) (emphasis added); *Kopkey v. State*, 743 N.E.2d 331, 337 (Ind.App. 2001) (probation is one point on a continuum of possible punishments); *Kennick v. Superior Court*, 736 F.2d 1277, 1281 (9th Cir. 1983) (probation is punishment for double jeopardy purposes).

Kincaid's request for credit for time spent on probation thus falls directly within the purview of *Pearce*. The trial court's failure to give Kincaid credit for the two (2) years spent on probation violated his constitutional guarantee against multiple punishments for the same offense under the Double Jeopardy Clause of Fifth Amendment to the United States Constitution.

2. Kincaid was not on probation at the time of his alleged violation because his term of probation had terminated as a matter of law

As the Indiana Court of Appeals correctly determined, if the trial court had complied with it's constitutional obligation and credited Kincaid with the two (2) year term of probation served prior to his conviction being set aside, he would have had no further term of probation to serve upon re-sentencing. If Kincaid was not unconstitutionally placed on probation at the time of re-sentencing, he would not have been on probation at the time of the violation at issue. Thus, it has been and remains unquestionable that Kincaid was not legally on probation at the time of the violation at issue.

The Opinion of the Indiana Supreme Court (the "Opinion") is, at best, unclear as to the basis upon which it found Kincaid's probation was subject to revocation even though it was admittedly unconstitutional *ab initio*. The Opinion references many possibilities. None are persuasive nor do they meet constitutional muster.

The Opinion initially claims that Kincaid did not raise the issue until after he violated his probation. *Kincaid*, 778 N.E.2d at 792-93. This is not true. Kincaid clarified this fact in his Petition for Rehearing by filing a Supplemental Appendix containing a transcript of the hearing wherein he was re-sentenced. This transcript clearly demonstrates that Kincaid requested credit for the time he spent on probation pursuant to Indiana Post-Conviction Rule 1 and *North Carolina v. Pearce* at the re-sentencing hearing.

The Opinion then proceeds to imply that Kincaid had waived his right to contest the probation revocation because he did not directly challenge the trial court's failure to give proper credit. *Kincaid*, 778 N.E.2d at 793. This point is also unavailing for several reasons. First, as set forth above,

Kincaid did request credit for the term of probation at the time he was re-sentenced. Second, as more fully explained below, Indiana law did not require a defendant to file a direct appeal of an erroneous sentence at the time Kincaid was re-sentenced. Third, this reasoning is contrary to this Court's holding in *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098 (1974), that double jeopardy protection is not waived by pleading guilty and collaterally seeking relief from an unconstitutional sentence through a writ of habeus corpus.[1]

The only rational explanation of the Opinion is that the Indiana Supreme Court held that a defendant must obey the rules of probation and is subject to serving the balance of a suspended sentence for any violations, even if his placement on probation was unconstitutional *ab initio*. This reasoning is flawed as it would completely vitiate the double jeopardy protections afforded by the Fifth Amendment in this context. It would also unconstitutionally deter a defendant's right to seek post-conviction relief because of the potential for vindictiveness upon re-sentencing. *See Pearce, supra; Blackledge, supra*. It would allow judges to unconstitutionally place defendants who successfully have their sentences set aside to an identical second term of probation with the hope they will violate and be sentenced to prison. Defendants would still be subject to imprisonment for violating the terms of their probation even though the decision to place them on probation was unconstitutional *ab initio*.

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[1]This Court's holding in *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757 (1989), limited the holding in *Blackledge* to cases where the double jeopardy issues can be judged on their face and do not require separate fact finding hearings. Kincaid's double jeopardy claim can be judged on its's face and, therefore, falls under the holdings of *Blackledge* and *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241 (1975).

Because it was, by all accounts, a violation of the Double Jeopardy Clause to sentence Kincaid to serve the same term of probation twice for the same offense, his term of probation upon re-sentencing was void *ab initio*. The term of probation terminated by operation of law at the conclusion of the initial term. *See Slayton v. State*, 534 N.E.2d 1130, 1131 (Ind.App. 1989); *Gilreath v. State*, 748 N.E.2d 919 (Ind.App. 2001). Therefore, it was not subject to revocation and Kincaid should not be ordered to serve the suspended portion of his two (2) year sentence.[2]

3. Retroactive application of the Indiana Supreme Court's Opinion to Kincaid violates Due Process because it constitutes an unexpected and indefensible change in Indiana law and came without fair warning[3]

Kincaid was re-sentenced by the trial court on February 23, 2000. Both the Indiana Court of Appeals and the Indiana Supreme Court agreed below that the trial court's placement of Kincaid on probation for a second time for the same offense was unconstitutional under the Double Jeopardy Clause. Indiana law at this time was clear on two critical issues relating to Kincaid's duties, or lack thereof, to preserve the error as of that date.

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[2]Of course, Kincaid acknowledges that he can be convicted of and sentenced for the underlying crime which is also alleged to constitute a violation of his probation. Kincaid merely argues that the conduct cannot also be used to execute his previously suspended sentence as a violation of probation.

[3]The Indiana Supreme Court's Opinion also violates the general principles of the Ex Post Facto Clause. Since it is a judicial act however, it is not subject to scrutiny explicitly under the Ex Post Facto Clause. *Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct. 1693 (2001).

First, at the time of Kincaid's re-sentencing, a sentence that was illegal as exceeding the trial court's statutory or constitutional authority constituted fundamental error which could be raised at any time--either by a defendant or by the State. *Kleinrichert v. State*, 297 N.E.2d 822 (Ind. 1973); *Lewandowski v. State*, 389 N.E.2d 706 (Ind. 1979); *Elkins v. State*, 659 N.E.2d 563, fn. 2 (Ind.App. 1995) (The Indiana Supreme Court has stated that a sentencing error may be raised at any time).

Second, at the time of Kincaid's re-sentencing, a defendant could not be sentenced for a probation violation if the defendant was not legally on probation at the time of the alleged violation. A defendant's probation terminated as a matter of law at the time it became illegal. *Slayton v. State*, 534 N.E.2d 1130 (Ind.App. 1989); *see also Gilreath v. State*, 748 N.E.2d 919 (Ind.App. 2001) (opinion rendered after Kincaid's sentencing but following the same reasoning as *Slayton*).

The Indiana Court of Appeals acknowledged both of these principles of Indiana law, either explicitly or implicitly, when it reversed Kincaid's sentence. *Kincaid*, 757 N.E.2d at 719. The Indiana Supreme Court's Opinion reinstating Kincaid's sentence, under any rationale, overturned both of these principles without fair warning and without explanation.

Kincaid was entitled to rely on Indiana law at the time of his re-sentencing in determining what was necessary, if anything, to ensure he was not given an executed sentence if he violated the terms of his unconstitutional term of probation. Indiana law was clear at that time that nothing was necessary. The retroactive application of the new principle(s) of law enunciated for the first time by the Indiana Supreme Court's Opinion to Kincaid violates Due Process.

In *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964), this Court considered the South Carolina Supreme Court's construction of the State's criminal trespass statute. This Court found that the construction of the criminal trespass statute that had occurred changed South Carolina law without warning and criminalized conduct that was not criminal at the time of the conduct. As such, the conviction was set aside as retroactive application of the new statutory construction to the defendant violated Due Process.

In *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199 (1973), this Court considered the revocation of a defendant's probation for receiving a traffic citation under Missouri law. The basis for revoking the defendant's probation was the conclusion of the trial judge that a traffic citation constituted "an arrest" in violation of the conditions of his probation. This Court reversed the trial court's revocation of the defendant's probation because the conclusion that the traffic citation constituted "an arrest" was an unforeseeable application of Missouri law and was rendered without fair warning. As such, it violated Due Process under *Bouie*.

As set forth above, the conclusion reached by the Indiana Supreme Court's Opinion is fundamentally flawed under the Double Jeopardy Clause. Even if this Court holds that the Indiana Supreme Court's actions do not violate the Double Jeopardy Clause however, it is clear that they dramatically, and without warning, changed Kincaid's obligations under Indiana law to ensure he was not sent to prison for violating a condition of his unconstitutional term of probation. This Court's decisions in *Bouie* and *Douglas* demonstrate that doing so violates Due Process.[4]

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[4]It is actually not clear from the Indiana Supreme Court's Opinion whether Kincaid could have done anything which would have prevented him from receiving an executed

CONCLUSION

The Opinion and judgement of the Indiana Supreme Court should be reversed. Sentencing Kincaid to serve the same two (2) year term of probation twice for the same offense violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. Because Kincaid's probation was void *ab initio*, it was not subject to revocation at the time of the alleged violation. Additionally, the Indiana Supreme Court's Opinion constitutes an unexpected and indefensible change in Indiana law. Because it came without fair warning to Kincaid, and subjected him to a two (2) year term of imprisonment for the first time, it violates Due Process. Accordingly, this case should be remanded to the Indiana Supreme Court with instructions to dismiss the State's Petition to Revoke Kincaid's Probation.

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sentence during his unconstitutional term of probation. Kincaid's alleged probation violation occurred only five (5) months after he was re-sentenced. Even if he had taken a direct appeal of the erroneous sentence, he would still have been on probation at the time of the alleged violation as any appeal could not have been decided in this five (5) month time frame. As such, Kincaid's probation arguably would still have been subject to revocation under the Opinion even if he had initiated a direct appeal.

Respectfully submitted,

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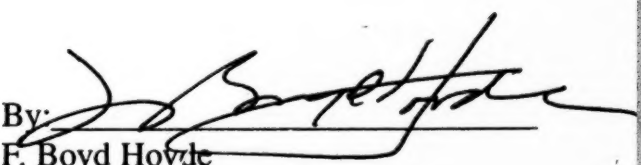

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APPENDIX A

FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

TERRY R. KINCAID,
Appellant - Defendant

No. 06A01-0104-PC-138

vs.

STATE OF INDIANA,
Appellee- Plaintiff.

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable James R. Detamore, Judge
Cause No. 06D02-9607-CF-310

November 6, 2001

OPINION - FOR PUBLICATION

VAIDIK, Judge

Case Summary

Terry R. Kincaid contends that the trial court's failure to credit him for probation served prior to granting his petition for post conviction relief violates the double jeopardyclauses of the United States and Indiana Constitutions. Because we find that double jeopardy principles dictate that Kincaid should have been credited for the time served on probation under his original plea agreement, we reverse.[1]

Facts and Procedural History

On July 29, 1996, the State filed charges of Escape, Resisting Law Enforcement, Operating While Intoxicated, Attempted Theft, and Criminal Mischief, as well as a violation of probation in another cause, against Kincaid. Kincaid and the State entered into a plea agreement in which Kincaid pled guilty to Resisting Law Enforcement and Operating While Intoxicated and the State dismissed the rest of the charges. Pursuant to the plea agreement that was accepted on September 22, 1997, the trial court sentenced Kincaid to the Indiana Department of Correction for a period of one year on each count, consecutive, which the trial court suspended except for the 22 days already served, and to supervised probation for a period of two years.

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[1]We hereby deny Appellant's Request for Oral Argument.

On June 10, 1998, a report that Kincaid violated his probation was filed.[2] Thereafter, the State filed a petition to revoke Kincaid's probation. After several continuances, the trial court held a final hearing on the petition to revoke on March 4, 1999. Kincaid admitted the violation and the trial court extended his period of probation by one year and ordered him to serve 60 days on house arrest as an additional condition of his probation.

On October 6, 1999, Kincaid sought post-conviction relief from the plea he entered into in September 1997. Kincaid alleged that he did not enter the plea knowingly and voluntarily. On February 3, 2000, the trial court granted Kincaid's petition and set aside his previously entered pleas to Resisting Law Enforcement and Operating While Intoxicated. Pursuant to Indiana Post-Conviction Rule 1, § 10,[3] Kincaid again pled guilty to Operating While Intoxicated

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[2]The record does not disclose the date on which Kincaid committed the violation.

[3] Indiana Post-Conviction Rule 1, § 10 provides:

(a) If prosecution is initiated against a petitioner who has successfully sought relief under this rule and a conviction is subsequently obtained, or

(b) If a sentence has been set aside pursuant to this rule and the successful petitioner is to be resentenced, then the sentencing court shall not impose a more severe penalty than that originally imposed unless the court includes in the record of the sentencing hearing a statement of the court's reasons for selecting the sentence that it imposes which includes reliance upon identifiable conduct on the part of the petitioner that occurred after the imposition of the original sentence, and the court shall give credit for time served

and Resisting Law Enforcement on February 17, 2000. The terms of the new plea agreement mirrored the terms of Kincaid's previous plea. The trial court did not credit Kincaid for the time he previously served on probation.

On July 28, 2000, Kincaid violated his probation and, subsequently, the State filed a petition to revoke Kincaid's probation, alleging that Kincaid had been charged with Operating While Intoxicated. Kincaid then filed a Motion to Correct Erroneous Sentence and to Dismiss Petition to Revoke alleging that the trial court had improperly failed to credit his new sentence with the time he had served on probation under the original sentence, and that, properly credited, his probationary term had expired prior to the violation. The trial court denied Kincaid's motion.

Next, Kincaid filed a motion to reconsider clarifying that he was seeking credit for the two years he had served on probation under the Double Jeopardy Clause of the United

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(c) The provisions of subsections (a) and (b) limiting the severity of the penalty do not apply when:
(1) a conviction, based upon a plea agreement, is set aside;
(2) the state files an offer to abide by the terms of the original plea agreement within twenty (20) days after the conviction is set aside; and
(3) the defendant fails to accept the terms of the original plea agreement within twenty (20) days after the state's offer to abide by the terms of the original plea agreement is filed.

States Constitution, Amendment V.[4] The trial court similarly denied this request, but stated that it would grant permission for an interlocutory appeal if requested. We denied Kincaid's petition for interlocutory appeal on December 4, 2000, and the trial court set the probation revocation for final hearing.

After the trial court denied an amended Motion to Correct Erroneous Sentence and to Dismiss Petition to Revoke, Kincaid admitted violating his probation by consuming alcohol. The trial court ordered Kincaid to execute the remaining portion of his sentence but granted his Motion to Stay Sentence Pending Appeal. This appeal ensued.

Discussion and Decision

Kincaid presents an issue of first impression for this court to review. Kincaid posits that the trial court's failure to credit him for probation served prior to granting his petition for post-conviction relief violates the Double

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[4] Although Kincaid did not assert a double jeopardy violation in his original motion, the State does not allege that such an omission resulted in waiver of the issue. Moreover, we have previously said that the court must address the merits of a defendant's motion to reconsider its previous sentence in view of the liberty interests at stake in continued incarceration. *See Weaver v. State*, 725 N.E.2d 945 (Ind. Ct. App. 2000). While the case at hand involves probation, not incarceration, we reach a similar conclusion due to the fact that probation, like incarceration, is a form of punishment that restricts a defendant's liberty interests. *See Kopkey v. State*, 743 N.E.2d 331,337 (Ind. Ct. App. 2001), *trans. denied. See also Parker v. State*, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997) (recognizing that a probationer enjoys only conditional liberty interests, not full liberty interests).

Jeopardy Clauses of the United States and Indiana Constitutions. In particular, Kincaid maintains that re-sentencing him to the full two years of probation resulted in multiple punishments for the same offense in contravention of double jeopardy principles. Moreover, he asserts that had the trial court credited him for the time he served on probation, he would not have had any further probation to serve and would not have been on probation at the time of his July 28, 2000 probation violation.

At the outset we acknowledge that a violation of a condition of probation does not constitute an offense within the purview of double jeopardy analysis. *Kincaid v. State*, 736 N.E.2d 1257, 1259 (Ind. Ct. App. 2000). This conclusion derives from the fact that revocation proceedings may be based upon violations of probation conditions rather than upon the commission of a crime, and the finding of whether a defendant has complied with these conditions is a question of fact and not an adjudication of guilt. *Id.* Accordingly, a trial court does not violate double jeopardy principles in requiring a probationer to serve his entire suspended sentence, without giving him credit for time spent on probation prior to the revocation, after finding he violated one or more conditions of his probation, even if he has served all but one day of his probationary period. Ind. Code § 35-38-2-3(a)(1), (g)(3); see also *Crump v. State*, 740 N.E.2d 564,568 (Ind. Ct. App. 2000), *trans. denied* (reiterating that the probationary period begins immediately after sentencing and ends at the conclusion of the probationary phases of the defendant's sentence); *Kincaid*, 736 N.E.2d at 1259 (declaring that one of the options available to a trial court when revoking a person's probation is to order the execution of the sentence that was suspended at the time of initial sentencing). However, in the instant case we are not dealing with a revocation of probation. Instead, we are presented with the question of

whether double jeopardy requires us to credit a probationer for time served on probation when the underlying conviction is set aside and the defendant is re-sentenced. We find that it does.

The U.S. Constitution, Amendment V provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This clause is applicable to the states through the Fourteenth Amendment. *Bryant v. State*, 660 N.E.2d 290,295 (Ind. 1995), *cert. denied* (citing *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056,23 L. Ed. 2d 707 (1969)). Similarly, the Indiana Constitution, Article I, ' 14 provides in part: "No person shall be put in jeopardy twice for the same offense."

Both the federal and state double jeopardy clauses have been interpreted to protect a person from suffering (I) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Wilcox v. State*, 748 N.E.2d 906,909 (Ind. Ct. App. 2001), *trans. denied. See also North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072,23 L. Ed. 2d 656 (1969), *overruled on other grounds*. The U.S. Supreme Court has stated:

> This last protection is what is necessarily implicated in, any consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured. The Court stated the controlling constitutional principle almost 100 years ago, in the landmark case of *Ex parte range*, [85 U.S. 163,] 18 Wall. 163, 168, 21L. Ed. 872:

> 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same [offense]. And * * * there has never been any doubt of (this rule's) entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.'
>
> '* * * (T)he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.' *Id.*, at 173.

Pearce, 395 U.S. at 717-18.

The State does not dispute that the two different pleas, each of which resulted in a two-year term of supervised probation, were based on the same offense. Therefore, we need only determine whether the trial court subjected Kincaid to "multiple punishments" for the same offense by re-sentencing him under the new plea agreement without giving him credit for time he served on probation under his original plea.

The U.S. Supreme Court has previously determined that "probation is itself a punishment that is criminal in nature." *Hicks v. Feiock*, 485 U.S. 624, 639 n.11 (1988). Likewise, we have recognized probation as a form of punishment. See *Kopkey v. State*, 743 N.E.2d 331,337 (Ind. Ct. App. 2001), *trans. denied* (stating "[i]n-home detention, like probation or incarceration, is a form of criminal punishment. Like probation, in-home detention is one point on a continuum of possible punishments ranging from solitary confine-

ment in a maximum-security facility to a few hours of mandatory community service.") (citations omitted). Moreover, it is a well-established principle that for double jeopardy purposes a defendant must be credited for time served if re-sentenced following a successful petition for post-conviction relief. Ind. Post-Conviction Rule 1, § 10. *See also Pearce*, 395 U.S. at 718 (enunciating that it is clear that the basic constitutional guarantee of not being subjected to multiple punishments for the same offense is violated when *punishment* already exacted for an offense is not fully credited in imposing sentence upon a new conviction for the same offense) (emphasis added). Because probation is punishment, as is actual incarceration, we find that a probationer is similarly entitled to credit for time served on probation for double jeopardy purposes.

Kincaid began his probationary period on September 22, 1997. He served approximately 261 days of his probationary period without incident. On July 21, 1998, a summons was issued for his appearance before the trial court for a probation violation report "that was filed with the court on June 10, 1998. Due to a series of continuances, the final hearing on his probation violation was not held until March 4, 1999. Because Indiana Code § 35-38-2-3(c) mandates that the issuance of a summons tolls the period of probation until the final determination of the charge, we do not include the period of time between July 21, 1998 and March 4, 1999, as time Kincaid spent on probation.[5] After admitting to the vio-

[5] Kincaid should also be credited for the 42 days of probation he served from the time of his violation to the time the summons was issued. *See* Ind. Code § 35-38-2-3(c) (providing for tolling upon issuance of the summons, not upon the commission of the probation violation).

lation,[6] Kincaid served 333 more days of his probationary period before his petition for post-conviction relief was granted. On February 17, 2000, Kincaid entered into a second plea agreement. At the time he entered the second plea, Kincaid had already served all but 94 days of his original probationary period. However, the trial court did not credit Kincaid for any of the time he spent on probation under the terms of the original plea agreement.

Based on the foregoing, we conclude that Kincaid was subjected to multiple punishments for the same offense in contravention of double jeopardy principles. Additionally, we recognize that to hold otherwise could have a chilling effect upon a defendant's decision to file a petition for post-conviction relief to set aside an illegal plea.[7] While the trial court acted within its discretion in accepting the new plea, it should have given Kincaid credit for the 636 days of probation he previously served. By not crediting Kincaid for the time he served on probation, the trial court subjected Kincaid to mul-

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[6] The trial court extended Kincaid's probation by one year after he admitted violating a condition of his probation. However, because the plea upon which the revocation was based was set aside, we find that the one year extension should also be set aside. Therefore, in determining whether the trial court erred in denying Kincaid's Motion to Dismiss Petition to Revoke we focus on whether Kincaid had fully served two years of probation, not three years, at the time of his July 2000 probation violation.

[7] Conversely, we conclude that this decision should not have a chilling effect upon trial judges' decisions to reassign defendants to probation after committing a probation violation in that judges should have confidence that their own pleas will not be set aside in post-conviction proceedings.

tiple punishments for the same offense. Accordingly, we reverse the trial court's order denying Kincaid's Motion to Correct Erroneous Sentence, and find that Kincaid should have received credit for the time he spent on probation prior to obtaining post-conviction relief. Further, because when properly credited his term of probation expired prior to his July 28, 2000 probation violation, we remand with instructions for the trial court to dismiss the State's Petition to Revoke. *See Slinkard v. State*, 625 N.E.2d 1282,1284 (Ind. Ct. App. 1993) (holding that where no violations occur during the original term of probation, in absence of misconduct in the hearing process or absconding from justice, the trial court may not revoke probation for events occurring after the original term of probation has expired).

Judgment reversed.

DARDEN, J ., concurs.

MATHIAS, J ., concurs with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

TERRY R. KINCAID,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 06AO1 -0104-PC-138
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff	)	

MATHIAS, Judge, concurring

I concur that, under the unique and extraordinary facts presented to the court in this case, it was error not to credit Kincaid with his probation time previously served on the same offenses. However, I write separately to emphasize my belief that the result appropriately reached with regard to Kincaid is not a holding that should support broad application and extrapolations throughout Indiana's criminal justice system.

The critical feature in this case is that Kincaid was not credited with his probation time served on exactly the same offenses to which he pled guilty a second time after the original convictions were overturned on a post-conviction relief petition. The State does not dispute that the two different pleas were based on the same offense. Had the prosecutor offered, and had Kincaid pled guilty after his PCR relief to any of the other charges, except the exact offenses which were subject to post-conviction relief, there would have been no need for the trial court to credit the probation time at issue, *See Kilpatrick v. State*, 746 N.E.2d 52,

59 (Ind. 2001) (stating the double jeopardy clause only prohibits multiple punishments for the same offense).

Probation remains a privilege and a matter of grace discretionary with the trial court. *See Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999); *Hubbard v. State*, 683 N.E.2d 618, 620 (Ind. Ct. App. 1997). It is usually, and in this case, the result of an extraordinary effort by the trial court to fashion an equitable and rehabilitative sentence individualized to a particular criminal defendant. Probation is also often an attempt to give a defendant "a second chance" in that defendant's fight against alcohol or drug addiction. Probation allows the defendant to avoid incarceration and attempt to remain a productive part of society, rather than being removed from society with all of the attendant costs to the defendant, the defendant's family and to society at large. Here, after his first probation violation, the trial court tried to responsibly fashion a "third chance" for Kincaid.

What a trial court can never know is whether a defendant will later come to believe that his or her original plea was legally involuntary. While I join in the sentiment of footnote 6, I am not as certain of it as I would like to be.

I am also concerned that defining probation broadly as punishment will lead to new extrapolation that pretrial release on bond, with or without restrictions such as electronic monitoring, is "punishment" that should somehow qualify for credit against a sentence ultimately imposed upon conviction. *See Molden v. State*, 750 N.E.2d 448, 451 (Ind. Ct. App. 2001) (holding that pretrial time spent in electronic home detention need not be credited to sentenced time of incarceration). Similarly, if probation is "punishment," it is difficult to logically justify the sentencing procedure sanctioned in *Sutton v. State*, 562 N.E.2d 1310, 1314 (Ind. Ct.

App. 1990), which holds that presentence incarceration does not have to be credited to executed incarceration time that is made a condition of a probation sentence upon conviction. Above all, I am quite certain that we cannot foresee the final destination at the end of this new road.

For all of these reasons, I write in concurrence to emphasize what I believe to be the limited precedential value of Kincaid's unique facts and circumstances.

APPENDIX B

ATTORNEY FOR APPELLANT	ATTORNEYS FOR APPELLEE
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FILED
NOV 12 2002
CLERK OF THE SUPREME COURT
COURT OF APPEALS AND TAX COURT

IN THE

SUPREME COURT OF INDIANA

TERRY R. KINCAID,	)
	)
Appellant	) Indiana Supreme Court
(Defendant Below),	) Cause No. 06SOI-0204-PC-258
	)
V	)
	)
	) Indiana Court of Appeals
STATE OF INDIANA,	) Cause No. 06A01-0104-PC-138
	)
Appellee	)
(Plaintiff Below).	)

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable James R. Detamore, Judge
Cause No. 0613029607-CF-310

ON PETITION FOR TRANSFER

November 12, 2002

BOEHM, Justice.

The Court of Appeals concluded that double jeopardy required that time served on probation must be credited toward a new sentence of probation imposed for the same conviction after a defendant successfully petitions for post-conviction relief. We agree. Kincaid's claim is also governed by Indiana Code section 35-50-1-5 and Post-Conviction Rule 1(10), which require credit for time served by a successful post-conviction petitioner who is resentenced. However, because Kincaid did not appeal his sentence until after he violated the terms of his probation, the trial court did not commit reversible error by requiring him to serve out the remainder of his sentence.

Factual and Procedural Background

On September 16, 1997, Terry Kincaid entered into a plea agreement with the State under which he pleaded guilty to Operating While Intoxicated and Resisting Law Enforcement in exchange far the State's dropping charges of Escape, Attempted Theft, Criminal Mischief, and a violation of probation in another case. On September 22, 1997, the trial court sentenced Kincaid to consecutive one-year sentences, suspended then but for time served, and placed Kincaid on probation for two years. Kincaid's probationary

period was extended an additional year on March 4, 1999, due to a violation.

On October 6, 1999, Kincaid filed a petition for post-conviction relief, arguing that his guilty pleas were not made knowingly or voluntarily. On February 3, 2000, after Kincaid had served 636 days on probation[1] the post-conviction court granted Kincaid's petition and set aside his convictions. On February 17, 2000, Kincaid again pleaded guilty to Operating While Intoxicated and Resisting Law Enforcement, and received two years probation. However, the trial court did not credit Kincaid with the 636 days of probation he had already served before winning in the post-conviction court.[2]

On July 28, 2000, Kincaid violated his probation by again operating a vehicle while intoxicated, and the State

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[1] The calculation of Kincaid's probation time served may be found in the Court of Appeals' opinion. Kincaid v. State, 757 N.E.2d 713, 718 (Ind. Ct. App. 2001).

[2] The trial court's new sentencing order and probation conditions make no mention of how, if at all, the court accounted for the days Kincaid already served on probation. The failure to mention those days raised the possibility that the court believed it was imposing a new probationary period of two years plus 636 days, giving credit to the 636 days Kincaid had served. However, the court's later order on Kincaid's motion to correct his sentence makes clear that the days were not credited by the new sentence: "This Court is aware of no cases and does not believe that any Appellate Court would determine that probation is being referred to by the words 'credit for time served.'"

filed a petition to revoke probation. Kincaid responded with a Motion to Correct Erroneous Sentence and to Dismiss Petition to Revoke, contending that the trial court improperly failed to credit his sentence with the 636 days he had served on probation under the original sentence. If those days had been credited, he argued, his second "two year" probationary term would have expired before the violation occurred. The trial court denied his motion.[3] Kincaid then filed a motion to reconsider, arguing that denying him credit for the 636 days violated the constitutional prohibition against double jeopardy. That motion also was denied. The trial court granted Kincaid leave to seek an interlocutory appeal, but the Court of Appeals denied Kincaid's petition to do so. After the trial court denied an amended Motion to Correct Erroneous Sentence and to Dismiss Petition to Revoke, Kincaid admitted violating his probation. The trial court ordered Kincaid to serve the remaining portion of his sentence, but stayed the order so that Kincaid might appeal that decision.

The Court of Appeals agreed with Kincaid's double jeopardy claim, holding that "Kincaid was subjected to multiple punishments for the same offense." Kincaid v. State, 757 N.E.2d 718 (Ind. Ct. App. 2001). To hold otherwise, the court stated, "could have a chilling effect upon a defendant's decision to file a petition for post-conviction relief to set aside an illegal plea." Id. This Court granted the State's petition to transfer.

Credit for Time, on Probation

A. *Constitutional Grounds*

[3] Neither Kincaid's motion nor the trial court's ruling is part of the record on appeal.

The State contends that the Court of Appeals' application of double Jeopardy, principles to Kincaid's case was erroneous, because "Indiana law provides that a defendant does not earn credit for time served while on probation." However, the case the State cites, Via v. State, 738 N.E.2d 684 (Ind. Ct. App. 2000), is not dispositive. Via addressed the issue whether probation time must be credited when probation is revoked and de defendant ordered to serve out the same sentence.

We agree that Via correctly held that a probation violation may result in an executed sentence for the full term. But Kincaid is not claiming that double jeopardy requires that a defendant who violates his probation and is ordered to complete his prison term is entitled to credit for the time spent on probation. That point is clearly settled against such a claim under double jeopardy principles, because the probation and prison time are both part of the same sentence. See, e.g., Hall v. Bostic 529 F.2d 990, 992 (4th (Jr. 1975). Rather, Kincaid's claim is that a defendant who succeeds in a Post-Conviction relief proceeding that vacates the initial sentence of probation, and who is given a new sentence of probation for the same crimes, is entitled to credit for the probation time already served.

Although the State concedes that probation is a form of criminal punishment, it contends that probation should not be considered punishment for double jeopardy purposes. However, the State cites no cases directly on point, and we agree with the several courts that have rejected this contention, "at least where the question is whether the probationer can be required to re-serve probation time already served." Kennick v. Superior Court 736 F.2d 1277, 1281 (9th Cir. 1983) (citing United States v. Bynoe, 562 F.2d 126, 128 (1st Cir. 1977); United States v. Teresi, 484 F.2d 894,

899 (7th Cir. 1973); Oksanen v United States, 362 F.2d 74, 130 (8th Cir. 1966); United States v. Rosenstreich, 204 F.2d 321 (2d Cir. 1953)); see also Commonwealth v. Walton 397 A.2d 1179, 1184 (Pa. 1979) ("[A]n order placing a defendant on probation must be regarded as punishment for double-jeopardy purposes."'). In North Carolina v. Pearce 395 U.S. 711, 718-19 (1969), the United States Supreme Court held that "the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." That was clearly the case here. Kincaid served 636 days of punishment (probation) for his first conviction, which was subsequently vacated, then served an additional term of punishment (probation) for a second conviction based on the very same offenses. Thus, the federal constitution requires that Kincaid receive 636 days credit from the first sentence toward the second sentence.

This Court has held that voluntarily accepting the terms of a plea agreement results in the waiver of double jeopardy claims arising from the sentence imposed. See Mapp v. State, 770 N.E.2d 332, 334 (Ind. 2002); Games v. State 743 N.E.2d 1132, 1134-35 (Ind. 2001). However, Mapp, Games and the earlier cases upon which they rest do not address the present situation. Rather, they deal with sentences that ordinarily would violate double jeopardy principles-e.g., sentencing for two "facially duplicative" charges, Mapp, 770 N.E.2d at 334, or an offense and its factually lesser-included charge, Games, 743 N.E.2d at 1134-35—but are imposed as a result of a bargain specifically calling for conviction on both crimes. Such an agreement forecloses, the risk of charges on other counts and typically provides an agreed or a maximum punishment. Acceptance of those benefits waives any double jeopardy objection to conviction

for the agreed crimes. Here, there was no bargain on the part of Kincaid and the State to forego crediting the 636 days Kincaid already had served in exchange for some other consideration. In fact, it appears that the original sentence was simply reimposed without the effect of Kincaid's probation time being addressed by the parties or the trial court. The issue was not raised until Kincaid claimed he should not have remained on probation at the time of his latest OWI incident. Under these circumstances Kincaid cannot be said to have agreed in the plea agreement to forego his constitutional right to credit for tine served.

B. *The Statutory Right to Credit for 'Time Served'*

Kincaid's claim also raises issues under Indiana Code section 35-50-1-5 and Post-Conviction Rule 1(10). Section 35-50-1-5 states:

> If:
>
> (1) prosecution is initiated against a petitioner who has successfully sought relief under any proceeding for postconviction remedy and a conviction is subsequently obtained; or
>
> (2) a sentence has been set aside under a postconviction remedy and the successful petitioner is to be resentenced;
>
> the sentencing court may impose a more severe penalty than that originally imposed, and the court shall give credit for time served.

(Emphasis added). Post-Conviction Rule 1(10)(b) similarly states:

> If a sentence has been set aside pursuant to this rule and the successful petitioner is to be resentenced, then the sentencing court shall not impose a more severe penalty than that originally imposed unless the court includes in the record of the sentencing hearing a statement of the court's reasons for selecting the sentence that it imposes ... and the court shall give credit for time served.

Kincaid's earlier sentence was set aside under a post-conviction remedy, and he was resentenced. Therefore, both the statute and rule apply.

The issue is whether time on probation is "time served" that must be credited when a successful post-conviction petitioner is again sentenced to probation for the same offense. Neither the statute nor the rule carves out an exception for time served on probation. And as the Court of Appeals pointed out, if no credit is given, petitioners like Kincaid who serve out a good portion of their sentence before the merit of their claim is decided would face longer punishment than those who forego the post-conviction relief process. This contravenes the principle on which the statute and rule are based: a successful petitioner should not be put in a worse position-in Kincaid's case, having to serve almost twice as much time on probation-than if he had not sought relief at all. Although both section 35-50-1-5 and Post-Conviction Rule 1(10) permitted the trial court to impose a more severe sentence than two years probation the second time around, they did not give it the discretion to ignore the 636 days on probation Kincaid had already served.

C. *Kincaid's Failure to Challenge His Sentence Until After His Violation*

Kincaid presumably could have challenged this failure to give proper credit, but he had not done so by the time he committed the probation violation. Kincaid's argument is that his violation should be ignored because the sentence upon which the probation was predicated was erroneous. We disagree. The Fourth Circuit Court of Appeals' analysis in United States v. Wright Nos. 94-6410, 95-6123, 1995 U.S. App. LEXIS 15839 (4th Cir. June 27, 1995) (unpublished), is instructive. Even though Kincaid's sentence was erroneous, Kincaid was not entitled to make that determination unilaterally and disregard the terms of his probation. Kincaid "had no more right to ignore the terms of his probation than he would have to escape from prison based on his own conclusion that he was wrongfully incarcerated. Self help is simply not a legal option for postconviction relief " Id. at * 15. Kincaid remained on probation subject to the terms of his original sentence until adjudicated otherwise. Thus the trial court did not commit reversible error by requiring Kincaid to serve out the unexecuted portion of his sentence.

Conclusion

Although Kincaid's new sentence should have credited him with the 636 days he already served on probation, no court had so ruled and Kincaid remained on probation at the time of his violation. Accordingly, the trial court's order to serve the remainder of his sentence is affirmed.

SHEPARD, C.J., and DICKSON, SULLIVAN and RUCKER, JJ., concur.

APPENDIX C

Brian Bishop
Clerk

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Cause Number
06S01-0204-PC-258
Lower Court Number:
06D02-9607-CF-310

KINCAID, TERRY R. -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 2/19/03

APPELLANT'S PETITION FOR REHEARING IS HEREBY DENIED, WITHOUT OPINION.

WITNESS my name and the seal of said Court this 19th day of February, 2003.

/s/

RANDALL T. SHEPARD, CHIEF JUSTICE